No. 93-1604

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF CLEARWATER, FLORIDA, *et al.*,

Petitioners,

—v.—

CHURCH OF SCIENTOLOGY FLAG SERVICE ORGANIZATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.1 STATEMENT

Respondent Church of Scientology Flag Service Organization, Inc. has no parent companies or subsidiaries to list pursuant to Rule 29.1 of the Rules of the Supreme Court.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF THE CASE..... 1

Statement of Facts 2

Proceedings Below..... 5

REASONS FOR DENYING THE PETITION..... 8

I. REVIEW OF THE ELEVENTH CIRCUIT'S INTERLOCUTORY ORDER IS INAPPROPRIATE BECAUSE DETERMINATION OF THE FACTUAL QUESTION WHETHER THE CITY ENACTED THE ORDINANCE WITH DISCRIMINATORY MOTIVE MAY PROVE DISPOSITIVE OF THIS LITIGATION..... 8

A. Resolution Of The Church's Establishment Clause Challenge Requires A Factual Determination Whether The Ordinance Was Enacted For An Improper Discriminatory Purpose .. 8

B. The Court Of Appeals Correctly Ruled That Conflicting Evidence Precluded The Grant Of Summary Judgment On The Question Of The City's Motive In Enacting The Ordinance... 10

II. THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS AND OF THIS COURT 13

PAGE

A. The Eleventh Circuit's Opinion Does Not Conflict With The Fifth Circuit's Decision In *ISKCON* v. *City of Houston* 15

B. The Eleventh Circuit's Decision Is Entirely Consistent With This Court's Ruling In *Jimmy Swaggart Ministries* 19

C. The City Has Articulated No Important Or Novel Legal Question For This Court's Review With Respect To The Eleventh Circuit's First Amendment Analysis 21

III. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARDS IN ANALYZING THE CHURCH'S ESTABLISH-MENT CLAUSE AND FREE EXERCISE CLAIMS 26

A. The Court Of Appeals Correctly Applied The Governing Establishment Clause Tests 26

B. The Court of Appeals' Free Exercise Analysis Is Consistent With This Court's Decision In *Employment Division* v. *Smith* 28

CONCLUSION 30

APPENDICES

February 4, 1991, Judgment in a Civil Case A-1

September 16, 1991, Order of the District Court Denying Motion for New Trial and/or Motion to Alter or Amend Judgment A-3

PAGE

September 17, 1991, Amended Judgment in a Civil Case A-5

July 23, 1984, Order of the District Court Holding Ordinance No. 3479-84 Facially Valid A-6

TABLE OF AUTHORITIES

Cases	PAGE
Adickes v. *S. H. Kress & Co.*, 398 U.S. 144 (1970)....	10
Aguilar v. *Felton*, 473 U.S. 402 (1985).....	28
Americans United for Separation of Church and State, et al. v. *City of Clearwater*, No. 84-699-Civ.-T-17 (M.D. Fla.).....	6
Branzburg v. *Hayes*, 408 U.S. 665 (1972).....	24
Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 14, 21, 29	
Church of Scientology Flag Service Organization v. *City of Clearwater*, 777 F.2d 598 (11th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986).....	6
Edwards v. *Aguillard*, 482 U.S. 578 (1987)	9
Employment Division v. *Smith*, 494 U.S. 872 (1990).....27, 28, 29, 30	
Fernandes v. *Limmer*, 465 F. Supp. 493 (N.D. Tex. 1979), *aff'd in part, reversed in (other) part*, 663 F.2d 619 (5th Cir. 1981).....	22
Gospel Army v. *Los Angeles*, 27 Cal. 2d 232, 163 P.2d704 (1945), *appeal dismissed*, 331 U.S. 543 (1947) 23, 24	
Hernandez v. *Commissioner of Internal Revenue*, 490 U.S. 680 (1989).....7, 9, 26, 27	
International Society for Krishna Consciousness of Houston, Inc. v. *City of Houston*, 689 F.2d 541 (5th Cir. Unit A 1982).....13, 15, 16, 17, 23	
International Society for Krishna Consciousness v. *Barber*, 650 F.2d 430 (2nd Cir. 1981)	23

PAGE

Jimmy Swaggart Ministries v. *Board of Equalization*, 493 U.S. 378 (1990) 19, 20, 27

Larson v. *Valente*, 456 U.S. 228 (1982) 26, 27

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 9, 26, 27

Lynch v. *Donnelly*, 465 U.S. 668 (1984) 7, 9, 10

Murdock v. *Pennsylvania*, 319 U.S. 105 (1943) 29

NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) 22

Riley v. *National Federation of the Blind*, 487 U.S. 781 (1988) 14, 29

Secretary of State of Maryland v. *Munson*, 467 U.S. 947 (1984) 23, 24, 29

Surinach v. *Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979) 22

Sylte v. *Metropolitan Government*, 493 F. Supp. 313 (M.D. Tenn. 1980) 23

Taylor v. *City of Knoxville*, 566 F. Supp. 925 (E.D. Tenn. 1982) 23

Village of Schaumburg v. *Citizens for a Better Environment*, 444 U.S. 620 (1980) ... 14, 23, 24, 25, 29

Wallace v. *Jaffree*, 472 U.S. 38 (1985) 9, 10

Constitution

U.S. Constitution, First Amendment ..... *passim*

Federal Statutes and Rules

26 U.S.C. § 170(c) 2

PAGE

26 U.S.C. § 501(c)(3) 2

Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb) 30

Fed. R. Civ. P. 56(c) 10

S. Ct. R. 14.5 ..... 1, 6

S. Ct. R. 15.1 2

S. Ct. R. 33.3(a) 6

State Statutes and Ordinances

Ark. Code Ann. § 4-28-408(a) 14

Conn. Gen. Stat. Ann. § 21a-190(d) 14

Fla. Stat. Ann. § 943.10 25

Ga. Code Ann. § 43–17–2(2) 14

Ga. Code Ann. § 43-17-9(a)(3) 14

Ga. Code Ann. § 43-17-9(d) 14

Haw. Rev. Stat. § 467 B-11(1) 14

Haw. Rev. Stat. § 467 B-11(6) 14

Ill. Rev. Stat. § 5103(a) 14

Ill. Rev. Stat. § 5103(b)(2) 14

Me. Rev. Stat. Ann. tit. 9, § 5003(1) 14

Me. Rev. Stat. Ann. tit. 9, § 5006(1)(A) 14

Md. Code Ann. § 6-102(c)(1)(ii)(2) 14

Md. Code Ann. § 6-102(c)(1)(ii)(3) 14

PAGE

Mass. Gen. Laws Ann. Ch. 67, § 20 14

Mich. Comp. Laws Ann. § 400.272(a) 14

Mich. Comp. Laws Ann. § 400.283(c) 14

Minn. Stat. Ann. § 309.515(b) 14

Minn. Stat. Ann. § 309.515(d) 14

N.J. Stat. Ann. § 45:17A-5(a) 14

N.J. Stat. Ann. § 45:17A-5(b)(2) 14

N.Y. Exec. Law § 172-a(1) 14

N.Y. Exec. Law § 172-a(2)(b) 14

N.C. Gen. Stat. § 131C-5(a) 14

N.D. Cent. Code § 50-22-01(1) 14

Ohio Rev. Code Ann. § 1716.03(A) 14

Ohio Rev. Code Ann. § 1716.03(D) 14

Okla. Stat. Ann. tit. 18, § 552.4(1) 14

Okla. Stat. Ann. tit. 18, § 552.4(3) 14

Pa. Stat. Ann. tit. 10, § 162.3 14

Pa. Stat. Ann. tit. 10, § 162.7(a)(2) 14

R.I. Gen. Laws § 5-53-3(2) 14

R.I. Gen. Laws § 5-53-3(6) 14

Va. Code Ann. § 57–48(2)(i) 14

Va. Code Ann. § 57-60(a)(4) 14

W. Va. Code § 29-19-6(4) 14

W. Va. Code § 29-19-6(5) 14

PAGE

City of Clearwater, Florida Ordinance No. 3479-84 . . *passim*

Other Authorities

BNA Daily Tax Reporter, No. 196 (Oct. 13, 1993) 2

Florida Dept. of Law Enforcement, *Crime in Florida*, 1989 Annual Report..... 25

Internal Revenue Service, *Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986*, Publication 78 (rev. 2-94), Supp. No. 1994-1 2

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Church of Scientology Flag Service Organization (the "Church") files this brief in opposition to the petition for writ of certiorari. As set forth herein, the opinion below was consistent with the decisions of this Court, and, contrary to the suggestions of the City, does not conflict with the decisions of the Fifth Circuit or any other circuit. Moreover, the court of appeals reversed the district court's order granting summary judgment to the defendant City on the plaintiff Church's claim of discriminatory purpose, on the ground that the record revealed controverted issues of material fact. The court of appeals remanded the case for trial on that issue. Thus, certiorari is particularly inappropriate in the present interlocutory context of this case, in the absence of a full record after trial.

OPINIONS BELOW

Petitioners fail to mention or append the judgment of the district court, dated February 4, 1991, granting the Church's motion for partial summary judgment on the issue of standing, denying the Church's motion for partial summary judgment on other issues, denying the City's motion for partial summary judgment on the issue of standing, and granting the City's motion for partial summary judgment on other issues (A-1 to A-2).[1] On September 16, 1991, the district court issued an order (A-3 to A-4) denying the Church's motion for new trial and/or to alter or amend judgment, except that the clerk was directed to amend the judgment to grant the City's motion for summary judgment on all issues, except standing. An amended judgment was issued on September 17, 1991 (A-5).

STATEMENT OF THE CASE

The petition fails to present a coherent or accurate account of the facts or the proceedings below. The petition should be denied on that ground alone. S. Ct. R. 14.5. In any event, it therefore is necessary for respondent to set forth these matters

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[1] References to "A__" are to pages in the appendix to this Brief. References to "__a" are to pages in the appendix to the petition itself.

in greater detail than might ordinarily be required in a brief in opposition. *See* S. Ct. R. 15.1.

Statement of Facts

Respondent is a church of the Scientology religion that provides religious training and counseling in Clearwater, Florida. R1-18-2.[2] The Internal Revenue Service has recognized the respondent as a church, within the meaning of 26 U.S.C. § 170(c), exempt from taxation under 26 U.S.C. § 501(c)(3). *See* Internal Revenue Service, *Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986*, Publication 78 (rev. 2-94), Supp. No. 1994-1.[3] Its religious activities are directed toward its members. R1-18-2. The Church solicits contributions from members at its facilities in Clearwater, usually in the course of offering its religious services. R5-110-Tab 3 at 9. Such solicitations are

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[2] Record references are made to the record in the court of appeals as follows: "R[volume]–[document number]–[page]" unless otherwise noted. Where the document in the record is indexed by tabs or volumes, the tab or volume is referred to prior to the page.

[3] To divert attention from the ordinance's extraordinary intrusion into internal church affairs, the City scurrilously alleges "a panoply of crimes and bad acts by and questionable policies of Scientology." Pet. at 5. The fact is that no federal, state or local crimes have ever even been charged against the Church or its officers, directors, or managing agents; the City has not alleged that they have. While it is true that over thirteen years ago certain officials of a different Scientology church were convicted for actions against the IRS in the mid-1970s, those officials long ago were removed from all positions of authority. Even the IRS has been satisfied that this is true, because it recently affirmatively recognized all Scientology churches, including respondent, as tax–exempt under 26 U.S.C. § 501(c)(3), *i.e.*, that the churches are operated in a manner consistent with public policy. *BNA Daily Tax Reporter*, No. 196 at K-1 to K-5 (Oct. 13, 1993). In any event, as discussed in the text, *post*, the ordinance does nothing to prevent or punish the kinds of acts the City describes.

The City's reference to alleged Church "policies," Pet. at 5, is similarly incorrect. The undisputed record below shows that the purported "make money" policy that the City quotes in tabloid style is merely "a description of the function and job of the person in charge of fundraising for the church." R5-114-3. There are no "policies" authorizing the kind of vindictive actions set forth by the City (Pet. at 5 n.2). R5-114-3, 4, 5.

typically made without representations as to the intended use of the money contributed; the contributions are used to support the general programs and operations of the Church. *Id.*

This case raises questions of the constitutionality of Clearwater Ordinance No. 3479-84 (143a-164a). The ordinance succeeds a prior ordinance, No. 3091-83, enacted in 1983, which is the subject of the Petition and Brief in Opposition in No. 93-1603, petition pending. The ordinance is directed toward the "solicitation" of funds by "charitable organizations," a term that encompasses groups that are or hold themselves out to be "benevolent, educational, voluntary health, philanthropic, humane, religious or eleemosynary" in nature. Section 100.01(1) (146a-147a). The term "solicitation of funds" is broadly defined to include not only all requests within the City "for the donation of money, property, or anything of value," but also the selling or offering for sale of any property, explicitly including books, pamphlets and brochures, "upon the representation, express or *implied*, that the proceeds of such sale will be used for a charitable purpose." Section 100.01(2) (147a) (emphasis added).

The ordinance requires all charitable organizations wishing to solicit funds to file a registration statement and obtain a certificate of registration from the City Clerk. Section 100.03(1) (151a). The registration statement calls for extensive information concerning the collection *and disbursement* of funds by the organization, including "an explanation of the intended use of the funds," Section 100.03(1)(d) (152a), a schedule of costs to be expended not only in the solicitation process itself, but also "in connection with their disbursement," Section 100.03(1)(i) (153a), and the names, addresses, and telephone numbers of all persons responsible for the disbursement. Section 100.03(1)(e) (152a). The registration statement is a public document. Section 100.03(7) (156a).

At the end of the annual period covered by the registration statement, the organization must file a public closing statement detailing the amount of funds solicited, all expenses incurred, and the actual or proposed use of the proceeds. Section 100.03(8) (156a-157a). Charitable organizations must maintain records and documents necessary for the filing of the registration and closing statements for a period of three years. Sec-

tion 100.04 (157a-158a). Thus, to the extent a charitable organization, *including* a church, solicits funds to carry out its general programs or operations (in contrast to a specific charitable purpose such as relief to victims of a flood or earthquake), it is required to provide detailed information concerning its overall budget and program of operations.

The ordinance also sets forth "Prohibited Acts," violation of which are punishable by a $1,000 fine or incarceration of up to six months. Section 100.05(1)-(2) (158a-160a). The City Attorney, upon receipt of ten "bona fide" complaints, must investigate alleged violations and issue subpoenas without court order. Section 100.06(1) (160a-161a). The City Attorney not only can inquire into the truth of information on the registration statement, Section 100.05(1)(b) (158a-159a), he also may investigate the "use of any scheme or artifice to defraud or obtain money or property by means of any false statement or representation." Section 100.05(1)(c) (159a). This authority has been construed by the City Attorney as permitting him to investigate whether promises of benefits from participation in religious services are fraudulent. R5-110-Tab 2, Ex. B. at 40-42.

Most critically, the ordinance regulates *all* solicitations by charitable organizations of their own members, on their own premises. Thus, even churches are required to submit to City officials detailed records concerning funds donated by members for the general purposes of the church, including a full accounting of all expenditures made from such funds. Sections 100.03, 100.04 (151a-158a). City officials may investigate such expenditures, require disclosure of all relevant church records, and bring prosecutions for failure to comply with provisions of the ordinance. Section 100.06 (160a-162a).

The ordinance provides an alternative to submission of registration and closing statements with respect to funds donated by members. Under Section 100.02(3) (151a), an organization may elect to exclude information regarding such funds from its public registration statement provided that it makes the same information available to all members in a "private statement." In addition, the organization *must* make available to its members "the records and documents that are necessary to complete this private statement for a period of three years . . ." Section 100.02(3)(c) (151a). Thus, the ordinance requires that churches

make their books and records available to every member upon demand, subject to potential criminal penalty.

Members or factions who are dissatisfied with their church's compliance with the private statement or the requirement as to open books and records may invoke the aid of the City Attorney to compel compliance. Sections 100.06(1), 100.05(b) (160a-161a, 158a-159a). The City Attorney is authorized to investigate organizations, including by the use of compulsory process, to determine whether they have provided full and accurate disclosure to their members. Section 100.06(2) (161a). And documents and records subpoenaed, including the private statement, become public records. Thus, by means of the enforcement process, these so-called private statements will ultimately become public documents as well.

Finally, the ordinance requires that churches that provide refunds for donations or purchases establish a written refund policy. Section 100.05(f)-(g) (159a). The ordinance requires that this statement be distributed at the time the policy is announced, even during a church service. R5-110-Tab 2, Ex. B 43-45. Moreover, the ordinance requires that refunds be made within sixty days of the request. Section 100.05(f) (159a).

Proceedings Below

The Church filed this lawsuit in March 1984, alleging that the ordinance was unconstitutional for a variety of reasons, including, *inter alia,* that (1) it was enacted with a discriminatory animus against the Church and the Scientology religion; (2) it unlawfully sought to regulate fundraising by churches from their own members and on their own premises; (3) it unlawfully caused excessive governmental intrusion into matters of ecclesiastical governance, administration, and finances; (4) it unconstitutionally imposed a licensing system for the sale or distribution of religious literature; and (5) it unlawfully vested broad discretion in the officials charged with its enforcement, without sufficient standards to govern its exercise. The complaint sought declaratory and injunctive relief.[4]

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[4] A coalition of religious groups, including the National Council of Churches of Christ in the U.S.A., the American Baptist Church, the American Jewish Committee, the Suncoast American Baptist Church, and

On July 13, 1984, after oral argument, the district court held that the ordinance was facially valid, stating no reasons for its conclusion, and certified the question of facial validity for appeal (A-6 to A-9). On August 17, 1984, the court of appeals granted the Church's application for permission to appeal the questions certified. A different panel vacated the prior panel's grant of leave to appeal, finding that the Church's facial challenge to the statute was not ripe for review. *Church of Scientology Flag Serv. Org.* v. *City of Clearwater*, 777 F.2d 598, 608 (11th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986).

Upon remand, the parties conducted discovery[5] and filed cross-motions for summary judgment. The district court granted the Church's motion for partial summary judgment that Scientology is a religion and that the Church has standing to raise its claims under the First Amendment religion clauses. In all other respects it rejected the Church's challenge to the ordinance. The district court granted the City's motion for summary judgment on all other issues, and dismissed the complaint. The

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Americans United for Separation of Church and State, also sued to challenge the constitutionality of the ordinance. That case remains pending in the district court, presumably awaiting final determination of this case. *Americans United for Separation of Church and State, et al.* v. *City of Clearwater*, No. 84-699- Civ.-T-17 (M.D. Fla.).

[5] In their petition in *this* case (Pet. at 11, Part D), petitioners attempt to incorporate a discussion about the discovery in *this* case that they improperly have placed in their petition in No. 93-1603 (Pet. in No. 93-1603, at 10-12, Part F). They also have included as an "appendix" to this petition two pages from their brief below (165a-166a). These blatant attempts to circumvent this Court's page limitation, S. Ct. R. 33.3(a), along with the other rule violations and unprofessionalism of the petitions, are reason enough to deny them. S. Ct. R. 14.5.

In any event, in the "incorporated" argument from the petition in No. 93-1603, petitioners suggest that the Church imposed meritless objections to the City's bloated discovery requests and improperly sought to extend this litigation. These allegations are false. When the Church objected to the City's 101 separate categories of document requests on the ground that they were grossly overboard and burdensome, the Magistrate Judge warned that if the City chose to file a motion to compel, he would impose a $50 fine for each unfounded request and each unfounded objection. R46-119-2. At that point, the City, obviously recognizing that discretion was the better part of valor, refrained from filing any motion to compel.

district court did not address the Church's claim that the City enacted the ordinance for a discriminatory sectarian purpose, to encourage or force the Church to leave town.

The court of appeals reversed the district court's judgment in major respects, remanding for further proceedings and trial on the Church's sectarian purpose claim. Applying well-established case law from this Court, the court of appeals held that if the predominant purpose of the ordinance was "to convey a message of endorsement or disapproval of religion," *Lynch* v. *Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring), or, to put it slightly otherwise, if the challenged law "was born of animus to religion in general or Scientology in particular," *Hernandez* v. *Commissioner of Internal Revenue*, 490 U.S. 680, 696 (1989), then it violated the Establishment Clause. The court of appeals then reviewed the evidence presented to the district court by both sides with respect to the City's motion for summary judgment, in the light most favorable to the Church as the non-moving party, and found that a trier of fact could conclude "that the city commission conducted its legislative process from beginning to end with the intention of singling out Scientology for burdensome regulation. The record shows a widespread political movement, apparently driven by an upsurge of sectarian fervor, intent on driving Scientology from Clearwater" (27a). The court of appeals concluded that the evidence presented by the Church "precludes judgment as a matter of law for the City" (35a). It vacated the judgment and remanded for further proceedings, including trial. *Id.*

The court of appeals also held key provisions of the ordinance unconstitutional, as applied to churches. The court turned its greatest attention to the provisions requiring churches to publicly disclose detailed financial information about how they used every dollar raised from virtually any source, including donations made by church members on church premises. Under the ordinance, a church could not solicit funds from its own membership at its own services without first obtaining a license from the city and without agreeing to make widespread disclosure of its intended and actual use of the funds raised. The court of appeals found these provisions to constitute improper and excessive regulation of and entanglement with internal

ecclesiastical matters (38a, 39a).[6] The City's petition for rehearing and suggestion of rehearing en banc was denied (140a).

REASONS FOR DENYING THE PETITION

I. REVIEW OF THE ELEVENTH CIRCUIT'S INTERLOCUTORY ORDER IS INAPPROPRIATE BECAUSE DETERMINATION OF THE FACTUAL QUESTION WHETHER THE CITY ENACTED THE ORDINANCE WITH DISCRIMINATORY MOTIVE MAY PROVE DISPOSITIVE OF THIS LITIGATION

The petition should be denied because it asks the Court to review a case that is in an interlocutory posture. In reversing the district court's decision granting summary judgment to the City, the Eleventh Circuit remanded the case for a factual inquiry into whether the City enacted the ordinance with an impermissible sectarian or religiously discriminatory purpose: to burden the Church and drive it from Clearwater. If trial reveals that the City enacted the ordinance for an improper purpose, the ordinance must fall on that ground alone. Review now is thus both unnecessary and premature; a determination that the City adopted the ordinance with an improper motive would obviate any need for further examination of the various legal questions the City purports to raise in its petition.

A. Resolution Of The Church's Establishment Clause Challenge Requires A Factual Determination Whether The Ordinance Was Enacted For An Improper Discriminatory Purpose

As the court of appeals recognized, throughout this litigation the Church has "vigorously argued" that the City enacted the

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[6] The court also struck down a provision mandating that if a church maintains a policy to refund donations under certain circumstances, it must do so within sixty days of a request. "The statute has the principal effect of mandating a church policy . . . The provision advances the City's illegitimate goal of dictating to churches what the [refund] policy shall be, simultaneously imposing its own enforcement mechanisms in support of the mandated policy" (69a–70a).

ordinance with the specific aim of substantially harassing and burdening the Church (26a), and displayed a preference for more "main-line" denominations by adapting the ordinance to accommodate their concerns, while refusing to consult with the Church over the legislation (28a-33a). In granting summary judgment to the City, the district court did not even mention this claim, let alone discuss the relevant evidence.

The court of appeals reversed and remanded for a full factual determination of the purpose behind the ordinance, applying well-established rules governing a claim that legislation was enacted with an improper religious motive in violation of the Establishment Clause. When legislation is attacked on Establishment Clause grounds, a court must first examine whether the law facially differentiates among religions. *Hernandez*, 490 U.S. at 695. If the legislation, like the ordinance at issue here, does not facially discriminate against or favor a particular religion, a court will then apply the three-pronged inquiry set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *see Hernandez*, 490 U.S. at 695, as did the Eleventh Circuit in this case.

The court of appeals correctly noted (18a) that the initial question under *Lemon* is whether the legislation has a "secular legislative purpose." *Lemon*, 403 U.S. at 612. Only if legislation has a secular purpose will a court examine, under the second and third prongs of *Lemon*, whether the legislation's primary effect is one that advances or inhibits religion, and whether the legislation promotes "excessive government entanglement with religion." *Id.* at 612-13 (citations omitted). The Church's claim that the ordinance was born of improper discriminatory motives thus implicates the first prong of *Lemon*, which focuses on "the purpose that animated adoption" of the law. *Edwards* v. *Aguillard*, 482 U.S. 578, 585 (1987).

If it is found that a law was enacted for an impermissible purpose, no inquiry into the second or third prong of *Lemon* is necessary; the law must fall on that ground alone. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *see also Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985). The factual question whether the ordinance "was born of animus to religion in general or Scientology in particular," *Hernandez*, 490 U.S. at 696, is thus both a threshold issue and potentially dispositive.

Although it attempts to argue that the court of appeals improperly applied the law on the question of discriminatory purpose, the City has cited no case in which legislation was upheld despite a determination that it was enacted with a religiously-based discriminatory purpose. Its failure to do so is not surprising; this Court has consistently stated that legislation enacted with the governmental purpose of either endorsing or disapproving of religion cannot survive scrutiny under the Establishment Clause. *See, e.g., Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *Wallace* v. *Jaffree*, 472 U.S. at 56. Thus, the court of appeals' simple application of these precedents raises no important or novel question of law, and there is no reason for this Court to review this case now before a complete record has been developed on the City's purpose in enacting the ordinance. Logic and concern for the orderly progression of litigation require that the case be remanded for a decision on this potentially determinative issue.

B. The Court Of Appeals Correctly Ruled That Conflicting Evidence Precluded The Grant Of Summary Judgment On The Question Of The City's Motive In Enacting The Ordinance

The City argues that the court of appeals wrongly interpreted the facts in finding that the record precluded summary judgment on the question of discriminatory purpose. Pet. at 12-13. This contention unquestionably does not afford a reason for this Court to review the case. The court of appeals applied the appropriate standard of review, correctly stating that "summary judgment may be granted only if no genuine dispute remains as to any material fact" (17a), *see* Fed. R. Civ. P. 56(c), and that the evidence must be "[c]onstrued in the light most favorable to the non-moving party" (27a); *see Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Applying this standard, the court was unable to rule out the existence of a genuine dispute as to a material fact (35a).

Despite the district court's non-treatment of this question, the court of appeals recognized that significant evidence suggests that the City did in fact act with invidious purpose in adopting the ordinance. "The record shows a widespread

political movement, apparently driven by an upsurge of sectarian fervor, intent on driving Scientology from Clearwater" (27a). Its detailed discussion of the evidence (27a-35a) confirms that it was correct in reversing the grant of summary judgment.

The court noted that the City had retained Michael Flynn, a Boston lawyer who has dedicated much of his career to litigating against the Church, to coordinate the hearings that led to adoption of the ordinances. Neither Flynn nor the City Commissioners made any secret that the proposed ordinance was directed at the Church; indeed, the local press referred to it as the "anti-Scientology" ordinance. R1-18-9, 10 and Vol. 2, Ex. M, Vol. 3, Ex. Q at 3, Ex. R, Vol 4, Ex. DD. During his election campaign, City Commissioner James Calderbank declared: "I will explore every avenue and support every legal means of encouraging the Scientologists to leave" (31a). A later newspaper article reported Calderbank as saying, "Scientology 'has to be treated like a cancer—first you arrest its growth, then remove it from the city . . . or nullify its existence.' " *Id.* Another candidate for a Commissioner's position was reported to say that "Scientologists lie, steal and cheat" and to believe that "the community must work to destroy the organization at the top" (32a). The then-mayor of Clearwater likewise characterized the Church as a "dark cloud that is upon us" (31a), and referred to "an organized effort of the City of Clearwater" in connection with the Scientologists (32a). When asked whether the City intended to hold hearings on any other organization, the mayor responded, "I don't know of anyone else that is claiming to be a religion that is not" (33a).

These comments by City officials are themselves sufficient to preclude holding as a matter of law that the City did not enact the ordinance with anti-Church animus. The court of appeals, however, also examined other evidence of improper purpose. For example, Flynn advised the City that the ordinance would allow it to collect data in support of its position that the Church is not a bona fide religion entitled to exemption from property taxes (28a). More tellingly, evidence revealed that the City hoped also to deprive the Church of its privilege to pay the lower non-profit bulk postage rates, and to interfere with the Church's state and federal income tax exemptions. *Id.*

These objectives, which are not legitimate concerns of a city government, may certainly be viewed as evidence of the City's desire to discriminate against the Church (28a-29a).

Evidence also showed that a number of changes were made in the 1983 ordinance at the request of "more popular denominations" (30a). For example, the City attempted to develop a definition of "membership" that, when combined with a membership exemption from the ordinance's reporting requirements, would exempt members of other churches, but not the Church. R1-18-27, Vol. 4, Ex. EEE at 4. (This provision was the subject of litigation concerning the 1983 ordinance. *See* No. 93-1603, pet. pending.) As another example, the Church is perhaps unique among religious organizations in that it permits members to obtain a limited refund of sums donated. This refund policy is intimately connected with the Church's ecclesiastical doctrines, and requests for refunds are considered in light of those doctrines. Consequently, the City's effort to regulate such refunds was obviously directed at the Church's unique policy and provides significant evidence that the City carefully constructed the ordinance to affect most strongly the Church, rather than other eleemosynary organizations.

The City's heated discussion of whether the court of appeals engaged in some kind of "transmutation of concern over crime into allegedly antireligious feelings," Pet. at 12, overlooks the obvious fact that the court of appeals did not make any ultimate determination on the City's motivation in adopting the ordinance. The court decided only that there was sufficient evidence to suggest that a trial might reveal that the City enacted the ordinance "with the intention of singling out Scientology for burdensome regulation" (27a), and consequently that summary judgment was inappropriate (35a).

The City's major objection appears to be that "[t]he panel had been informed that deposition testimony showed uniformly that Clearwater was concerned only with crimes and bad acts." Pet. at 12. Of course, the City can point to no authority for the proposition that self-serving deposition testimony of its own officials (for which it provides no record citations) is controlling over all other evidence. The City also protests that the court of appeals' observations "may have condemned Clearwater to future defeat at trial upon remand." Pet. at 13. This

extravagant claim is ludicrous. No ultimate factual determination has yet been made whether the City acted with impermissible motive, or, if so, whether it would nevertheless have enacted the ordinance, and this determination can be made only after a full factual development in the district court. At base, the City's argument is simply a lament over the existence of conflicting evidence on the issue of improper motive. This only confirms that the court of appeals ruled correctly that summary judgment was inappropriate on this issue, and that the conflicting evidence should be weighed properly at a full trial.

II. THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS AND OF THIS COURT

The City repeatedly asserts that certiorari is necessary to resolve a purported conflict between the decision of the Eleventh Circuit in this case and the decision of the Fifth Circuit in *International Soc'y for Krishna Consciousness of Houston, Inc. ("ISKCON")* v. *City of Houston*, 689 F.2d 541 (5th Cir. Unit A 1982), as well as the rulings of other courts of appeals and this Court. According to the City, if the Eleventh Circuit's rulings are allowed to stand, they will throw into question numerous other disclosure laws. Pet. at 2.

Petitioners have attempted to manufacture a conflict where none exists. As shown below, the Eleventh Circuit's decision is entirely consistent with the Fifth Circuit's decision in *ISKCON* v. *City of Houston*, with numerous other rulings of courts of appeals, and with decisions of this Court.

What petitioners fail to acknowledge is that the ordinance at issue in this case is unique. In no other jurisdiction has a government entity sought to regulate solicitations by churches for general church purposes or solicitations by churches of their own members on church premises. Only in Clearwater, Florida, and nowhere else, has a government entity attempted to require that a minister file a registration statement prior to passing the plate at a Sunday service or to mandate statements accounting for every dollar collected from the faithful.

Thus, petitioners' repeated statements that the ordinance is "similar or identical to hundreds, or thousands, of state, county

and city disclosure laws all over the country," Pet. at 2, is false. A survey of state and local solicitation laws demonstrates that they all exempt either solicitation conducted by religious organizations, at least for general church or religious purposes, or membership solicitations.[7] The typical charitable solicitation law is directed at non-religious organizations raising money for a single or a variety of specific charitable purposes, such as flood or famine relief, medical research, or aid to the poor. And even laws of that kind have been subject to searching First Amendment scrutiny and review. *See Riley* v. *National Fed'n of the Blind*, 487 U.S. 781 (1988); *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620 (1980); and *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). No court has ever upheld a law requiring detailed disclosure of a church's overall budget, its program of operations, and its solicitations of its own members on its own premises.

Indeed, it was precisely these aspects of the ordinance—its requirements of extensive disclosure of a church's program of

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[7] Petitioners list a number of registration and disclosure laws, which they contend are similar, if not identical, to the Clearwater ordinance. *See* Pet. at 7 & n. 3. However, in so doing, they ignore the sections of those laws that establish the exemptions described above. The following sections of the laws petitioners cite exempt from their coverage membership solicitations: Ark. Code Ann. § 4-28-408(a); Ga. Code Ann. §§ 43-17-9(a)(3),-9(d); Haw. Rev. Stat. § 467 B-11(6); Ill. Rev. Stat. § 5103(b)(2); Me. Rev. Stat. Ann. tit. 9, § 5006(1)(A); Md. Code Ann. § 6-102(c)(1)(ii)(3); Mich. Comp. Laws Ann. § 400.283(c); Minn. Stat. Ann. § 309.515(d); N.J. Stat. Ann. § 45:17A-5(b)(2); N.Y. Exec. Law § 172-a(2)(b); Ohio Rev. Code Ann. § 1716.03(D); Okla. Stat. Ann. tit. 18, § 552.4(3); Pa. Stat. Ann. tit. 10, § 162.7(a)(2) (only short form required); R.I. Gen. Laws § 5-53-3(6); Va. Code Ann. § 57-60(a)(4); W. Va. Code § 29-19-6(4).

These sections broadly exempt religious organizations: Ark. Code Ann. § 4-28-408(a); Conn. Gen. Stat. Ann. § 21a-190(d); Ga. Code Ann. 43-17-2(2); Haw. Rev. Stat. § 467 B-11(1); Ill. Rev. Stat. § 5103(a); Me. Rev. Stat. Ann. tit. 9, § 5003(1); Md. Code Ann. § 6-102(c)(1)(ii)(2); Mass. Gen. Laws Ann. Ch. 67, § 20; Mich. Comp. Laws Ann. § 400.272(a); Minn. Stat. Ann. § 309.515(b); N.J. Stat. Ann. § 45:17A-5(a); N.Y. Exec. Law § 172–a(1); N.C. Gen. Stat. § 131C-5(a); N.D. Cent. Code § 50-22-01(1); Ohio Rev. Code Ann. § 1716.03(A); Okla. Stat. Ann. tit. 18, § 552.4(1); Pa. Stat. Ann. tit. 10, § 162.3; R.I. Gen. Laws § 5-53-3(2); Va. Code Ann. § 57–48(2)(i); W. Va. Code § 29-19-6(5).

operations and its solicitation of its members—that were critical to the Eleventh Circuit's determination that key provisions of the Clearwater ordinance violated the Establishment Clause and failed to meet the exacting scrutiny required under the First Amendment. Moreover, the Eleventh Circuit's ruling was grounded on and entirely consistent with well-established law both in the courts of appeals and this Court. No basis exists, therefore, for this Court to grant review of the decision.

A. The Eleventh Circuit's Opinion Does Not Conflict With The Fifth Circuit's Decision In *ISKCON* v. *City of Houston*

The City contends that the ordinance is identical to an ordinance enacted by the City of Houston that required charitable organizations, including churches, to register and disclose information as a condition to solicitation of the public in public places and whose constitutionality was challenged in *ISKCON* v. *City of Houston*. According to the City, because the Eleventh Circuit struck down the Clearwater ordinance, while the Fifth Circuit upheld the Houston ordinance, the two decisions conflict. A close examination of the two decisions, however, reveals that not only are the two ordinances not identical, but the two decisions are entirely consistent. Indeed, the reasoning of the Fifth Circuit required the rejection of certain provisions of the Clearwater ordinance as unconstitutional.

Petitioners are correct that the Eleventh Circuit noted that the information requested by the Clearwater ordinance is "virtually identical" to the disclosure required under the Houston ordinance. However, petitioners fail to disclose that in the *very same sentence* the court stated that despite this superficial similarity, "there are significant differences between the Clearwater and Houston laws" (7a). The court then engaged in a lengthy and detailed analysis of those differences.

First, the Eleventh Circuit noted that, unlike the Houston ordinance, the Clearwater disclosure form must be filed "even if the organization intends to solicit only from its own members" (8a). The Houston ordinance, in contrast, contained a broad exemption for membership solicitations and solicitations on an organization's premises. *See ISKCON* v. *City of Houston*, 689 F.2d at 544. Second, although both the Houston and Clear-

water ordinances required the filing of a retrospective reporting statement at the end of each annual registration period, Clearwater's provisions for retrospective disclosure "differ[ed] from the Houston ordinance" in that they were far more extensive and far-reaching (9a). Not only did the Clearwater ordinance require detailed disclosure of the expenses incurred in the solicitation of funds and of every proposed or actual use of the funds, but it required disclosure of the bank account in which the funds were located, applied to membership solicitations, and imposed criminal penalties for failure to comply. Third, the court noted that the Clearwater ordinance defined a number of other criminal offenses in connection with its disclosure requirements, whereas "[n]o such criminal provisions were included in the Houston ordinance" (10a).

Finally, the Eleventh Circuit found that the Clearwater ordinance conferred far broader executive discretion than the Houston ordinance with respect to enforcement of the ordinance, and that the Houston ordinance provided a means by which churches could avoid unwanted state entanglement in their affairs. Under the Houston ordinance, an organization could choose to omit information from the registration statement so long as it furnished an explanation for the omission. *See* 689 F.2d at 547. As the Eleventh Circuit recognized, Houston had adopted an interpretation of its ordinance "giving the administering official no discretion to evaluate the adequacy of information provided by registrants" (11a). Indeed, as Houston emphasized in its brief to the Fifth Circuit, the enforcing official had "no power to review the information for accuracy nor to judge the sufficiency of any explanation offered [as to why information was not included.]" R5-113-Exhibit A. Houston further suggested that the only basis to deny a certificate would be if the applicant were to file a wholly or partially "blank registration form" and that the only function of the official reviewing the form would be "to determine whether or not it has been filled out." *Id.* The Fifth Circuit adopted this interpretation of the law as controlling. *ISKCON* v. *City of Houston*, 689 F.2d at 547. In contrast, the Eleventh Circuit found that the City of Clearwater explicitly refused to limit the discretion of city officials in these respects. The Clearwater city clerk had the power

to determine whether a registration form met the ordinance's requirements and to deny registration if it were determined that it did not. This power included the ability to "determine whether the stated purpose of the solicitation was in fact a charitable one" as well as to require a "specific explanation of how the funds will be used to further the purposes stated" (10a-11a). In addition, the Clearwater ordinance contained no express guidance with respect to these matters. *Id.*

Moreover, it was precisely these differences between the ordinances that compelled the Eleventh Circuit to conclude that certain provisions of the Clearwater ordinance fostered excessive government entanglement with religion in violation of the Establishment Clause. Essential to the Fifth Circuit's upholding of the Houston ordinance was its exemption for organizations that solicit from their own members. Houston had emphasized in its brief that "the failure to grant such [a membership] exemption would unduly interfere with the practice of religion in violation of the First Amendment." R5-113-Exhibit A. The Fifth Circuit echoed this argument, noting: "All that is mandated is disclosure to the public about those funds which are solicited from the public." *ISKCON* v. *City of Houston*, 689 F.2d. at 556. Critical for the court was that the "internal operations of the organization, apart from its public solicitation, remain under the veil of privacy." *Id.*

Also critical to the Fifth Circuit's decision was the removal from the Houston law, by amendment, of the city's broad investigatory and prosecutorial powers, a change that substantially mitigated the possibility of enduring government surveillance of and entanglement with churches. *Id.* at 543, 546-47. The court placed particular emphasis on the fact that the ordinance did not permit the city to deny a solicitation certificate simply because of an organization's decision not to supply certain information or because of the intended use of the funds raised. Because of the limited discretionary function of the enforcing official, if a church believed that to provide certain information would result in excessive entanglement with its affairs, it could simply say so, and this explanation would have to be accepted. (Houston did not believe that this rendered its ordinance meaningless because potential public donors would at least know that the church declined to provide the information in question,

and could act accordingly.) In contrast, in finding certain provisions of the Clearwater ordinance unconstitutional, the Eleventh Circuit placed particular emphasis on the city's broad investigatory, prosecutorial, and discretionary powers.

For example, the Eleventh Circuit found that unlike routine administrative and recordkeeping regulations narrowly drawn to specific regulatory objectives, the "detailed monitoring and close administrative interaction" imposed by the Clearwater ordinance involved the executive and judicial authorities in every aspect of the church's activities (38a). Not only did it make them "the ultimate arbiters of the appropriate level of disclosure to the church's members in all matters of ecclesiastical fiscal administration" but it also conferred "responsibility for apprising themselves and the public concerning such matters." *Id.* According to the court, this "detailed" and "close" surveillance violated the command of the Establishment Clause that " '[n]either a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.' " *Id.* (quoting *Everson* v. *Board of Educ.*, 330 U.S. 1, 16 (1947)).

The court of appeals further found that Clearwater's alternative private statement procedures applicable to member solicitations also triggered excessive entanglement because they subjected churches to the continuous surveillance of their members (with the ultimate threat of City intervention, investigation and prosecution) by requiring disclosure of all records underlying the statements upon request (39a). Not only did the City not possess the power to require a church to make such detailed information available to its members, but in trying to accomplish this objective, the City "impermissibly imposed its own preferences concerning the degree of disclosure to members concerning daily operations." *Id.* Such conduct directly violated the principle of the Establishment Clause that "civil authorities must abstain from interposing themselves in matters of church organization and governance" (41a).

Finally, the Eleventh Circuit determined that the regulatory regime imposed by the Clearwater ordinance was "doubly offensive" because of its imposition of criminal enforcement mechanisms (44a). The investigatory and prosecutorial powers conferred by the ordinance "underscore[d] the already sub-

stantial risk of government participation in intramural church conflict and decisionmaking" and thus further fostered an excessive government entanglement. *Id.* As noted above, the Houston ordinance contained no such provisions.

Thus, contrary to petitioners' suggestion, the Eleventh Circuit's decision is entirely consistent with the Fifth Circuit's. The Eleventh Circuit's ruling was based precisely on those aspects of the Clearwater ordinance that distinguished and differentiated it from the Houston law. Indeed, in this respect, it is also significant that the Eleventh Circuit did not determine that the entire ordinance was unconstitutional. Rather, it upheld certain provisions whose disclosure requirements standing alone would in operation and effect be similar to the requirements imposed by the Houston ordinance (45a).

B. The Eleventh Circuit's Decision Is Entirely Consistent With This Court's Ruling In *Jimmy Swaggart Ministries*

The City also suggests that the Eleventh Circuit's decision conflicts with *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378 (1990), where this Court held that the imposition of a generally applicable sales and use tax did not violate the Establishment Clause. The City's argument appears to be that the Eleventh Circuit failed to take into account the purported ease of complying with the ordinance when it found that it fostered an excessive government entanglement with religion. *See* Pet. at 23. The City suggests that this factor was critical to the Court's upholding of the regulation challenged in *Swaggart*. This argument, however, serves only to demonstrate petitioners' profound misunderstanding of both the decision in *Swaggart* and the court of appeals' decision in this case.

In *Swaggart*—indeed, in the same section of the opinion from which the City quotes, *see* Pet. at 21—the Court specifically held that the administrative and recordkeeping burdens imposed by a regulation are, in and of themselves, of limited consequence in determining whether such a regulation violates the Establishment Clause. 493 U.S. at 394-95. Rather, the critical issues are whether the statutory scheme results in " 'official and continuing surveillance' " of the organization's day-to-day operations or whether the imposition of the tax

requires the state to inquire into the religious motive, content, or purpose underlying the transaction. *Id.* at 395-96 (citation omitted). In *Swaggart*, the Court found that the tax law required "neither the involvement of state employees in, nor on-site continuing inspection of, [the church's] day-to-day operations" and that the state's only concern was whether there was a sale or use. *Id.* The Court therefore held that there was no excessive entanglement resulting from the imposition of the tax.

In contrast, the Eleventh Circuit, after exhaustively reviewing the scope and effect of the Clearwater ordinance, found that it was " 'significantly more intrusive into religious affairs' " than any other "solicitation" regulation previously reviewed by the courts, including the law challenged in *Swaggart* (38a) (citation omitted). Indeed, the Eleventh Circuit explicitly distinguished the statutory scheme in *Swaggart* and that imposed by the ordinance. Whereas the tax imposed in *Swaggart* was "narrowly drawn to specific regulatory objectives" (37a), and did not "enmesh the government in religious affairs," 493 U.S. at 699, the court of appeals found that Clearwater's extensive disclosure requirements and its program of "detailed monitoring and close administrative interaction" would draw the government deeply into "every aspect of the church's activities" (38a). Moreover, it would subject the church to "the continuous surveillance" not only of the government but of its own members (39a). Finally, because Clearwater's disclosure provisions were coupled with broad investigatory and prosecutorial powers, the City would be required to inquire into the religious motive for the church's activities and the propriety of particular expenditures (10a-12a, 44a).

The Eleventh Circuit's conclusion that the Clearwater ordinance fostered an impermissible and excessive government entanglement with religion was thus entirely consistent with *Swaggart*. Indeed, the reasoning and principles set forth in *Swaggart* compelled this conclusion. In sharp contrast to the "narrowly drawn" regulatory scheme in *Swaggart*, which limited the contact between church and state, the ordinance established a regulatory scheme that invited and required intrusive entanglement, thereby rendering it unconstitutional.

C. The City Has Articulated No Important Or Novel Legal Question For This Court's Review With Respect To The Eleventh Circuit's First Amendment Analysis

The City claims that the Eleventh Circuit "refused to credit Clearwater's crucial interest in protecting its populace against fraud and bad acts and refused to credit the usefulness of disclosure in furthering that interest." Pet. at 18. Contrary to the City's assertion, the Eleventh Circuit specifically held that the City has a "compelling interest in preventing affirmative fraud" by a religious organization upon church members and the public (60a). However, after extensive analysis, the court concluded that this interest was "not precisely furthered by the broad disclosures compelled" by the ordinance (58a), and that the ordinance was not sufficiently narrowly tailored to serve the City's interest (63a). As such, the ordinance failed to meet the strict scrutiny required under the First Amendment.

Critical to the court's analysis was that the ordinance's disclosure and reporting requirements were not simply aimed at preventing affirmative fraud, such as a false representation by a "stranger" that money solicited will go to a particular charity. *See, e.g., Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940). The ordinance also required a church to disclose to government authorities, the public, and its members on a continuing basis all of its activities and expenditures with respect to all funds raised for its general purposes, even when the funds were raised from its own members and on its own premises. However, based on this Court's precedents, the Eleventh Circuit found that the state has no legitimate interest in requiring a church to disclose either to members or to public contributors how funds solicited for general church purposes will be used. Indeed, the Eleventh Circuit correctly determined that the First Amendment precludes the state from forcing a religious organization to make such information available.

As the court of appeals noted, it is well-established that " '[a]ll who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it' " (56a) (quoting *Watson* v. *Jones*, 80 U.S. (13 Wall.) 666, 728 (1872)). Based on this principle, the court concluded that

the City could not "substitute its own judgment as to the desirable level of disclosure to church members" (57a). This is precisely what the ordinance accomplished. By requiring a church to disclose to members on a continuing basis how it chooses to use funds solicited for general church purposes, the ordinance dictated to religious organizations how they should govern themselves and imposed a freedom of information act upon a church and its members.

Similarly, with respect to disclosure of information to the public, the Eleventh Circuit held, relying on this Court's precedents, that the state "may not compel specific disclosures merely because, in its view, some potential contributors to some causes might tend to think that those facts evidence unfairness or some other objectionable quality in the use to which funds will be put" (57a-58a). Instead, before donating to a religious organization, a non-member may demand any information desired and " 'if the solicitor refuses to give the requested information, the potential donor may (and probably would) refuse to donate' " (58a) (quoting *Riley*, 487 U.S. at 799). The state, however, may not require that such information be provided. To do so would "burden a great deal of protected expression without serving any legitimate purpose" (59a).

Thus, while recognizing the state's compelling interest in preventing religious organizations from fraudulently representing how they will use solicited funds, the Eleventh Circuit correctly determined, in conformity with a host of other court decisions, that the ordinance was not sufficiently tailored to achieve this interest. *See, e.g., NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (warning that "the very process of inquiry" into internal church activities "may impinge on rights guaranteed by the Religion Clauses"); *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979) (to same effect, specifically with respect to ongoing financial disclosure by churches); *Fernandes* v. *Limmer*, 465 F. Supp. 493, 504 (N.D. Tex. 1979) ("No church . . . should be compelled to . . . explain the source and use of each dollar without a showing of compelling need achievable by no adequate alternative," and finding no such need in the context of solicitation activity), *aff'd in part, reversed in (other) part*, 663 F.2d 619, 631 (5th Cir. 1981) (finding First Amendment bar "to a complete finan-

cial audit" of churches under guise of solicitation ordinance); *Taylor* v. *City of Knoxville*, 566 F. Supp. 925, 932 (E.D. Tenn. 1982) (same); *Sylte* v. *Metropolitan Gov't*, 493 F. Supp. 313, 319 (M.D. Tenn. 1980) (same).

Indeed, petitioners have been able to point to no other "disclosure" statute or ordinance that has required churches to make such continuing and public disclosures of their budgets and activities, let alone of funds raised from their own members, nor to any court opinion upholding such a law. Furthermore, the City's reliance on *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620 (1980), and *Secretary of State of Maryland* v. *Munson*, 467 U.S. 947 (1984), for the proposition that this Court has approved or sanctioned the use of such "disclosure" statutes is not only wholly misplaced, but it is misleading. First, in neither case was there any attempt to regulate solicitation of members or compel disclosure of such donations or the use of the proceeds. Second, neither case involved attempts to regulate solicitations by churches for general fundraising purposes.[8] Finally, neither case authorized the kind of disclosure plus investigatory and prosecutorial powers that exist in the Clearwater ordinance.[9] Indeed, in both *Schaum-*

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[8] In discussing the use of disclosure laws to prevent fraud, this Court quite clearly contemplated public fundraising appeals by traditional "charities," such as the March of Dimes or the United Way. Indeed, in *Schaumburg*, this Court cited as an example of such a financial disclosure law an Illinois statute regulating solicitations by traditional charities. 444 U.S. at 638 n.12 (citing Ill. Rev. Stat. Ch. 23 § 5102(a) (1977)). The Illinois statute, significantly, exempted religious organizations from the scope of its regulation. Ill. Rev. Stat. at § 5103.

[9] Petitioners' reliance on a number of circuit court cases for the same proposition is similarly misleading. As discussed, *ante*, in *ISKCON* v. *City of Houston*, the court emphasized that no attempt was made to regulate solicitation of members and no disclosure was required except with respect to funds raised from the public. In *International Soc'y for Krishna Consciousness* v. *Barber*, 650 F.2d 430 (2nd Cir. 1981), the court, while recognizing the state's interest in preventing fraud in the solicitation of funds, *invalidated* the ordinance because of a failure to establish that no less restrictive means were available. Finally, in *Gospel Army* v. *Los Angeles*, 27 Cal. 2d 232, 163 P.2d 704 (1945), *appeal dismissed*, 331 U.S. 543 (1947), the solicitation ordinance regulated only secular fundraising activities of religious organizations, exempting solic-

burg and *Munson*, this Court, while recognizing the state's interest in preventing fraud, invalidated solicitation regulations because, as here, they were not sufficiently tailored to serve the state's interest.

For similar reasons, the City's contention that the Eleventh Circuit's decision endangers the ability of the government to protect citizens against other crimes carried out by religious organizations, *see* Pet. at 26-27, is equally frivolous. Nowhere has the City even attempted to demonstrate how the ordinance will accomplish that purpose. Because the ordinance regulates speech, association, and free exercise of religion, the City must " 'convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.' " *Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972) (quoting *Gibson* v. *Florida Legislative Investigation Comm'n*, 372 U.S. 539, 546 (1963)).

The ordinance, however, bears no " 'reasonable relationship to the achievement of the governmental purpose asserted as its justification.' " *Id.* (citation omitted). It hardly warrants explanation that a law that purports to regulate charitable solicitations by means of a complex and detailed licensing scheme could not possibly affect such activities as burglaries, electronic bugging, framing of opponents, etc. Moreover, as the Eleventh Circuit recognized, penal laws that directly prohibit acts over which the City has expressed concern already exist. Indeed, not only are these criminal laws more direct and effective in combatting such crimes than an ordinance compelling disclosure of voluntary donations of members to churches, but the penal provisions further the government's interest by means less restrictive of First Amendment rights (62a). Criminal statutes affect only criminal acts and criminals, unlike the ordinance, which interjects City officials into every donation by every church member in the City. Indeed, as this Court stated in *Schaumburg*, it in no way follows that because fraud,

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itations made for evangelical, missionary, or religious purposes. 163 P.2d at 711.

The other cases cited, Pet. at 21, are not relevant. They involve the application of generally applicable laws to religious organizations, not solicitation regulations that implicate First Amendment freedoms.

trespass, and other crimes can be and generally are directly proscribed, charitable solicitation can be unduly restricted: " 'considerations of this sort do not empower a municipality to abridge freedom of speech and press.' " 444 U.S. at 639 (quoting *Schneider* v. *State*, 308 U.S. 147, 164 (1939)).

The City's response to the above proposition once again demonstrates a complete misunderstanding of applicable law. It complains that "*Clearwater cannot enforce the kinds of alternative laws listed by the Circuit*," which present less restrictive means for addressing the City's asserted interests in controlling illegal and coercive conduct of religious organizations, because they are "*state* laws." Pet. at 18 (emphasis in original). This statement is astonishing. It is the duty and function of Clearwater's own police department to enforce state penal laws within the City. *See, e.g.*, Fla. Stat. Ann. § 943.10 (defining the term "law enforcement officer" as a person "employed full time by any municipality . . . whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic or highway laws of the *state*.") (emphasis added). Clearly, the City's contention that it does not have the power to enforce such laws is absurd.[10]

Finally, the City contends that this Court should review this case because the Eleventh Circuit's decision impairs the government's ability to protect citizens against crime by disabling legislatures from passing anti-crime statutes inspired by the actions of particular criminal organizations. *See* Pet. at 24-25. This argument is without merit. To enact an anti-crime bill that may punish criminals who are incidentally members of a particular religion is obviously quite different than to enact a statute with the primary aim of discriminating against a religion. The unusual circumstances of this case—where legislation was directly aimed at burdening a particular religion—obviously have no bearing on a government's general ability to enact anti-crime legislation.

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[10] In 1989 alone, the Clearwater police made 91 arrests for robbery, 269 for aggravated assault, 327 for burglary, 1,778 for larceny, 2 for kidnapping, and 2 for murder. Florida Dept. of Law Enforcement, *Crime in Florida*, 1989 Annual Report 206. None of the arrests are known to have been of officers, directors, or employees of the Church.

III. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARDS IN ANALYZING THE CHURCH'S ESTABLISHMENT CLAUSE AND FREE EXERCISE CLAIMS

A. The Court Of Appeals Correctly Applied The Governing Establishment Clause Tests

The City contends that the court of appeals incorrectly failed to apply a compelling state interest test to its analysis of whether the ordinance was enacted for a sectarian purpose and created excessive entanglement between City officials and church entities in violation of the Establishment Clause. This argument is without merit.

The City's reliance on *Larson* v. *Valente*, 456 U.S. 228 (1982), for the proposition that a compelling state interest test should be applied to the Church's Establishment Clause claim conflates two separate issues: whether legislation *facially* discriminates among religions and whether legislation was enacted with an improper motive or creates excessive entanglement. The City wrongly equates the Eleventh Circuit's conclusion that the ordinance is facially neutral with a finding that the City did not intend to discriminate against the Church in enacting the ordinance. *See* Pet. at 15-16.

The court of appeals refused to apply *Larson* because the law here is facially neutral, whereas *Larson* involved an ordinance that facially created a denominational preference (50a). The Court in *Larson* held only that *Lemon* is inapplicable in those circumstances where a law facially discriminates. *See* 456 U.S. at 252. The Court clarified the *Larson* analytic framework in *Hernandez* v. *Commissioner of Internal Revenue*, 490 U.S. 680, 695 (1989): when there is a claim "that a denominational preference exists," the initial question is whether the challenged law facially differentiates among religions as did the ordinance in *Larson*. "If, however, no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon*." *Id.* (citation omitted). *Hernandez* thus clarifies that the *Lemon* analysis, rather than

the *Larson* compelling-interest analysis, is to be applied in a case like this, where a facially-neutral statute is claimed to have been enacted out of religious animus.

Hernandez also repudiates the City's suggestion that the Eleventh Circuit should have determined, under *Employment Division* v. *Smith*, 494 U.S. 872 (1990), that the ordinance was constitutional because, the City claims, it is generally and neutrally applicable. Pet. at 15, 28. *Hernandez* makes it quite clear that even if the ordinance were found to be facially neutral and generally applicable, which is not the case here, it would not *ipso facto* survive an Establishment Clause challenge. To the contrary, after legislation claimed to violate the Establishment Clause is determined to be facially neutral, a court should then turn to the *Lemon* analysis, *see* 490 U.S. at 695, as did the Eleventh Circuit in this case.

Finally, the City's claim that the court of appeals should have applied the compelling state interest test in determining whether the ordinance creates an impermissible entanglement between City officials and church entities rather than the *Lemon* analysis is, in essence, a false issue. As the City itself acknowledges, *see* Pet. at 28, this Court has found that the *Lemon* tests "reflect the same concerns that warrant[] the application of strict scrutiny." *Larson*, 456 U.S. at 252. Indeed, in determining whether a regulation creates an excessive entanglement, a court must take into account and incorporate the secular interest of the government into its analysis. The *excessive* entanglement prong of the *Lemon* test, as set forth by this Court, "requires examination of 'the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.' " *Swaggart*, 493 U.S. at 393 (quoting *Lemon*, 403 U.S. at 613). Consideration of the government's interest is thus built into the process of determining whether a regulation creates an *excessive* entanglement under all the facts and circumstances. The Court's decisions with respect to questions of excessive entanglement reflect precisely this type of analysis. *Cf. Swaggart*, 493 U.S. at 697-699 (balancing government's interest in imposing sales and use tax against level of government intrusion into religious affairs in

finding no excessive entanglement); and *Aguilar* v. *Felton*, 473 U.S. 402 (1985) (weighing nature of state aid, institution receiving aid, and resulting relationship between church and state in administration of aid in finding that entanglement between church and state was excessive).

In sum, the Eleventh Circuit applied the correct legal standards to the Church's Establishment Clause claim, and its analysis presents no compelling question for this Court's review.

B. The Court of Appeals' Free Exercise Analysis Is Consistent With This Court's Decision In *Employment Division v. Smith*

The City contends that the free exercise portion of the court of appeals' decision conflicts with this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), because the court of appeals refused to apply *Smith's* neutrally-and-generally-applicable test to the City's regulation of solicitation activity. The City also incredibly asserts that the Eleventh Circuit "rul[ed] the compelling interest/strict scrutiny test inapplicable" to the Church's Free Exercise claim. Pet. at 17. However, neither of these arguments presents a *bona fide* question meriting this Court's review.

Initially, the City's contention that the court "rul[ed] the compelling interest/strict scrutiny test inapplicable" to the Church's Free Exercise claim is simply not true. The court of appeals clearly applied the test, indeed, stating "we employ 'exacting First Amendment scrutiny' " (55a) (citation omitted). The court concluded that the ordinance did not survive strict scrutiny, not that the test was inapplicable (55a-63a).

Second, the core of the Eleventh Circuit's decision rests upon the Establishment Clause. Thus, even if *Smith* required a less exacting scrutiny under the Free Exercise Clause than applied by the court, the court's purported error would not have affected the outcome of the case.

Third, the court of appeals was clearly correct in applying strict scrutiny to the Church's hybrid free exercise/free speech claim. It is critical to recognize, as the court of appeals did and as the City fails to do, that the First Amendment right at issue is not simply that of free exercise, but a right grounded in freedom of speech and association, as well as the non-entanglement

principles of the Establishment Clause. It is firmly established that solicitation is protected as speech under the First Amendment, both because it is an effective method of proselytizing and because fundraising is necessary for a church or association to survive. *See, e.g.*, *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 788-89 (1988); *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 629 (1980); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). Courts carefully scrutinize regulation of solicitations to ensure that the state does not infringe upon protected activity. *See, e.g.*, *Riley*, 487 U.S. at 789 (regulation of charitable solicitation subject to "exacting First Amendment scrutiny"); *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 961 (1984) (laws regulating solicitations must be "narrowly drawn" so as not to "unnecessarily interfer[e] with First Amendment freedoms"); *Village of Schaumburg*, 444 U.S. at 637 (same).

The City's reliance upon *Smith* is thus misplaced. *Smith* addressed, and was limited to, "a free exercise claim unconnected with any communicative activity or parental right." 494 U.S. at 882. Indeed, *Smith* carefully noted that its rule did not apply to hybrid situations, such as here, where free exercise concerns are reinforced by other constitutional protections:

> such as freedom of speech . . . *see Cantwell* v. *Connecticut*, 310 U.S. at 304-307 (invalidating a licensing system for religious and charitable solicitations . . .) . . . And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. *Cf. Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984).

494 U.S. at 881-82. Thus, not only does *Smith* not purport to diminish the level of scrutiny required by *Riley, Schaumburg,* and a host of other decisions, but the decision explicitly supports strict scrutiny, as in *Cantwell*, "for religious and charitable solicitations." *Id.* Indeed, to find otherwise, would mean that simply because a church challenged the Clearwater ordinance, the ordinance would be subject to a lesser level of scrutiny than if the challenge had been brought by a secular

charity, e.g., the National Federation for the Blind, as in *Riley*, or by a political advocacy group, e.g., the Citizens for a Better Environment, as in *Schaumburg*.

Finally, in any event, *Smith* should no longer be applied. On November 16, 1993, the President signed into law the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb). That Act directs the federal and state courts to apply strict scrutiny to all free exercise challenges to federal, state, and local laws. It prohibits any government entity from burdening religious free exercise, "even if the burden results from a rule of general applicability," *id.* at § 3(a), except "in furtherance of a compelling governmental interest" and then only by "the least restrictive means of furthering that compelling governmental interest." *Id.* at § 3(b). Moreover, the Act applies to all federal, state and municipal laws "whether adopted before or after the enactment of this Act." *Id.* at § 6. And, finally, the government bears the burden of proof to justify any burden on religious free exercise. *Id.* at §§ 3(b) & 5(3).

In sum, the Eleventh Circuit correctly applied the strict scrutiny test to the Church's hybrid free exercise/free speech claim and there is no compelling question of law requiring this Court's review.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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CAROLINE RULE

JOHNSON & JOHNSON

Attorneys for Respondent

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NUMBER 84-719-CIV-T-17

Filed February 4, 1991

CHURCH OF SCIENTOLOGY FLAG SERVICES ORG., INC.,

Plaintiff,

—v.—

CITY OF CLEARWATER, *et al.*,

Defendants.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came before the Court. A decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Plaintiff Church of Scientology Flag Service, Org., Inc.'s Motion for Partial Summary Judgment against Defendants, City of Clearwater, et al., on the issue of standing is Granted.

That Plaintiff Church of Scientology Flag Service Org., Inc.'s Motion for Partial Summary Judgment against Defendants, City of Clearwater, et al., on all issues other than standing is Denied.

That Defendants, City of Clearwater, et al.'s Motion for Partial Summary Judgment against Plaintiff Church of Scientology Flag Service Org. Inc., on the issue of standing is Denied.

That Defendants, City of Clearwater, et al.'s Motion for Partial Summary Judgment against Plaintiff Church of Scientology Flag Service Org. Inc., on all issues other than standing is Granted.

February 4, 1991
Date

DAVID L. EDWARDS
Clerk

MEARLE S. SAYLOR
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 84-719-CIV-T-17

Filed September 16, 1991

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,

Plaintiff,

—v.—

CITY OF CLEARWATER, *et al.*,

Defendants.

ORDER

This cause is before the Court on the following:

Dkt. 147 Plaintiff's motion for new trial and/or motion to alter or amend judgment filed, February 19, 1991

Dkt. 153 Defendants' response to Plaintiff's motion for new trial and/or motion to alter or amend judgment, filed March 12, 1991

Dkt. 162 Defendants' motion for leave to file supplemental memorandum in response to the Plaintiff's motion for new trial and/or motion to alter or amend judgment, filed May 3, 1991

Dkt. 163 Plaintiff's motion for leave to respond to Defendants' proposed supplemental memorandum, filed May 16, 1991

The Court has carefully reviewed the above documents. Accordingly, it is

ORDERED:

1. That Plaintiff's motion for new trial and/or motion to alter or amend judgment is denied except to the extent that the judgment should be amended for clarification. The Clerk is directed to amend the judgment to read as follows:

"That Defendants, City of Clearwater, et al.'s motion for summary judgment is denied on the issue of standing, and granted against Plaintiff, Church of Scientology Flag Service Org., Inc., on all other issues."

2. That all other motions listed above are denied as moot (Dkt. 162, 163).

DONE AND ORDERED at Tampa, Florida this 16th day of September, 1991.

/S/ ELIZABETH A. KOVACHEVICH
Elizabeth A. Kovachevich
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 84-719-CIV-T-17

Filed September 17, 1991

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.

—v.—

CITY OF CLEARWATER, *et al.*

AMENDED JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Defendants, City of Clearwater, et al.'s motion for summary judgment is denied on the issue of standing, and granted against Plaintiff, Church of Scientology Flag Service Org., Inc., on all other issues.

September 17, 1991
Date

DAVID L. EDWARDS
Clerk

SIMONE A. KONNER
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHURCH OF SCIENTOLOGY
FLAG SERVICE ORG., INC.,

Plaintiff(s),

vs.

CITY OF CLEARWATER,
et al.,

Defendant(s).
_____/

Case No.
84-96-CIV-T-17

ORDER

In their complaint, inter alia, the plaintiffs contend that amended ordinance 3479-84, a copy of which is attached, facially violates the freedom of religion, freedom of press, freedom of speech, and freedom of association guarantees of the First Amendment; the right of privacy guarantee of the First,

Fourth, Fifth, and Ninth Amendments; and the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. To facilitate and accelerate the disposition of these claims, the Court requested the parties to submit legal memoranda solely on the issue of the constitutionality of the amended ordinance on its face. Having considered the memoranda, the arguments of the parties, and International Society for Krishna Consciousness of Houston, Inc. v. City of Houston, Texas, 689 F.2d 541 (5th Cir. 1982) and Poe v. City of Humble, Texas, 554 F. Supp. 233 (S.D. Texas 1983), the Court now rules that each and every section of amended ordinance 3479-84 is constitutional on its face.

Pursuant to Title 28 U.S.C. §1292(b), the Court expressly opines that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. Counsel have indicated to the Court their desire to immediately appeal this Court's ruling; therefore, the Court orders the Clerk of the Court to Administratively Close case numbers 84-96, 84-699, and 84-719 during the pendency of said appeal.

DONE and ORDERED in Chambers, in Tampa, Florida, this 23rd day of July, 1984.

Elizabeth A. Kovachevich
United States District Judge

Copies furnished to:
All Counsel of Record